

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 59959-3-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
ROBERT EUGENE BURROW,)	Unpublished Opinion
)	
<u>Respondent.</u>)	Filed: August 3, 2009

LAU, J. — Robert Burrow appeals his convictions for attempted murder, burglary, and violation of a protection order, claiming that ineffective assistance of counsel, the trial court's denial of funds for an expert witness, and juror misconduct deprived him of a fair trial. Because he fails to demonstrate any prejudicial error by his attorney or any abuse of discretion by the trial court and because any juror misconduct did not contribute to the verdict, we disagree and affirm.

FACTS¹

Joni Butz worked for Jeff Hulseley at his truck dealership for over 16 years,

¹ Although the parties have included an extensive recitation of the facts in their briefs, the majority of the factual details are irrelevant to the actual claims of error.

beginning in 1989. Although Butz and Hulsey had a romantic relationship early on, when their romance ended, they remained close friends and Butz continued to work for Hulsey. Butz dated Robert Burrow for nine years. Their relationship ended in August 2004 after incidents in a criminal charge against Burrow prompted Butz to obtain a protection order. Early in 2005, Butz began dating Steve Benson, a salesman at Hulsey's dealership.

In the early morning hours of April 9, 2005, Burrow appeared at Hulsey's home in Snohomish County and fought with Hulsey. Shortly thereafter, Burrow went to Butz's home in King County and confronted Butz and Benson. Based on the events of that morning, the State charged Burrow with three counts of attempted murder in the first degree, two counts of first degree burglary, and a felony violation of a court order, each with a deadly weapon enhancement.

At trial, Hulsey testified that after working until 4 a.m., he was preparing to go to bed when he heard strange noises. He found Burrow bleeding from a leg wound that apparently occurred when Burrow was kicking his way through the locked French doors. Hulsey gave Burrow a hand towel and tape to stop the bleeding. Burrow then demanded to see Butz and searched the house for her. When Hulsey encouraged Burrow to leave, Burrow attacked Hulsey with a knife. After receiving several stab wounds to the shoulder, arms and neck, Hulsey escaped, got his gun, shot Burrow, called 911, and ran out of the house.

Butz and Benson testified that they awoke to hear Burrow breaking into Butz's condominium. While Butz was calling 911, Benson watched Burrow reach in through

the broken window and unlock the door. According to Benson, Burrow came directly to him and stabbed him in the chest. Benson hit Burrow with a metal baton and hurried out of the room, attempting to draw Burrow away from Butz. Before waking up on the dining room floor, Benson remembered Burrow following him. Benson returned to the bedroom to find Burrow holding a knife to Butz's neck. Benson tackled Burrow and held him until the police arrived.

Burrow testified in his defense that he went to Hulse's house to demand the money that Hulse owed him from a boat purchase that had been the subject of an insurance fraud perpetrated by Hulse and Butz. According to Burrow, when he threatened to call the police to report Hulse's scam, Hulse attacked him with a knife and shot him. He left to go to the hospital, became confused, and eventually drove to Butz's home, intending to ask for help. He claimed to be unable to recall much of the events that occurred after he arrived, other than accidentally breaking and then squeezing through a window.

Police and medical personnel testified that after his arrest, Burrow was in and out of consciousness. At Harborview Medical Center, doctors noted Burrow's extremely low blood pressure and that medics had treated him by inserting a breathing tube, but his wounds were not severe. Burrow's toxicology screen was positive for amphetamines, methamphetamine, evidence of marijuana, and evidence of some anti-anxiety medication, but medical personnel did not perform tests to determine the amounts of these substances.

The jury found Burrow guilty of the lesser included charge of attempted murder

in the second degree as to Hulse, two counts of attempted murder in the first degree as to Butz and Benson as charged, two counts of first degree burglary, and felony violation of a protection order, each with a deadly weapon enhancement. The trial court imposed a standard range sentence.

Following trial, a juror told the prosecutor that she brought a measuring tape into the jury room and that the jurors used it to measure the blade of the broken knife found at Hulse's home. The prosecutor and the juror signed affidavits as to these facts.

Burrow appeals.

ANALYSIS

Ineffective Assistance of Counsel

Burrow first contends that he received ineffective assistance of counsel when his attorneys failed to call additional witnesses and present favorable evidence to support his version of the facts, failed to bring a motion for a new trial based on juror misconduct, and failed to clarify the factual inaccuracies in the trial court's statements in its order denying defense motion for appointment of an expert.

To prevail on an ineffective assistance claim, a defendant must show that defense counsel's representation was deficient and the deficient representation prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A valid tactical decision cannot provide the basis for an ineffective assistance claim. State v. Alvarado, 89 Wn. App. 543, 553, 949 P.2d 831 (1998) (defense attorney's decision not to object to the admission of damaging evidence was not deficient performance because the evidence was admissible). The

defendant must show an absence of legitimate strategic reasons to support the challenged conduct. Alvarado, 89 Wn. App. at 548. Prejudice is established by demonstrating a reasonable probability that the outcome of the trial would have been different if the evidence had not been admitted. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

First, Burrow claims that his attorneys failed to call witnesses or present evidence to support his claims regarding the insurance fraud involving the boat, his attempts to collect money from Hulse, his close friendship with Hulse, and his activities the night before the incident. Burrow's attorneys presented testimony from Burrow and his sister, carefully cross-examined the State's witnesses, and presented argument at trial. Burrow fails to identify any specific witness with potentially relevant testimony or to argue or establish that counsel did not make a legitimate strategic decision not to present any particular witness or specific item of evidence. Moreover, he fails to claim or demonstrate that any additional evidence on these collateral matters would have had any impact on the outcome of the trial.

Next, regarding the failure to bring a motion for a new trial, Burrow particularly faults defense counsel for failing to interview the juror to determine whether other acts of misconduct occurred. Because Burrow fails to demonstrate that a motion for a new trial would have been successful or that the record includes sufficient facts to indicate deficient performance, this ineffective assistance claim fails. See State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) ("presumption of effective representation can be overcome only by a showing of deficient representation based on the record

established in the proceedings below”).

Finally, regarding the trial court’s misstatements of the facts involved in the defense motion for an expert, the record reveals that defense counsel filed a motion for reconsideration stating,

This Court’s order contained some factual errors that counsel would like to clarify to ensure that this Court had an accurate understanding of the history of this case with respect to previous requests for the Appointment of Expert and the basis for those requests. In addition, counsel would like to clarify other factual issues seemingly misstated in the Court’s order based on points in counsel’s Certification.

The attached three-page certification specifically and accurately detailed the facts surrounding counsel’s efforts to obtain funding from the Office of Public Defense (OPD) and counsel’s contacts with potential experts, as well as the facts of the case relevant to a potential diminished capacity defense. In light of this record, Burrow cannot succeed on his claim of ineffective assistance for failure to “clarify to the bench the factual inaccuracies regarding the motion for an expert.” Br. of Appellant, at 43.

Expert Witness

Burrow next contends that the trial court erred by denying his motion for the appointment of an expert at public expense to evaluate Burrow for a diminished capacity defense.

A decision to grant or deny a motion for expert services under CrR 3.1(f)² lies within the sound discretion of the trial court and will not be reversed absent a manifest

² CrR 3.1(f)(1) provides, “A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.”

abuse of discretion. State v. Adams, 77 Wn. App. 50, 54, 888 P.2d 1207 (1995).

Here, based on Burrow's claim of total memory loss following his arrest, the trial court ordered both an in-custody competency evaluation and a later inpatient evaluation by Western State Hospital expert evaluators. One of Burrow's defense attorneys also obtained funding of up to \$4,450 from OPD for an evaluation by Dr. David White of Seattle of Burrow's competency and the potential for a diminished capacity defense. A subsequent defense attorney sought OPD approval for a second expert to evaluate the potential for a diminished capacity defense based on drug use. In particular, counsel sought \$12,000 in public funds for the services of Dr. Zakee Matthews from California. OPD denied the request as "neither necessary in nature nor reasonable in amount," but offered to consider alternatives.

Defense counsel sought review of OPD's decision in the trial court. The trial court noted that OPD had already approved the appointment of a local expert who was apparently "unwilling to provide the opinion the defense seeks" and denied the motion for the appointment of Dr. Matthews as not reasonably necessary, "[w]ithout prejudice to the Office of Public Defense consideration of another local expert as set forth in OPD's denial."

Thus, the trial court properly exercised its discretion to deny the expenditure of significant additional sums for a second expert from another state. The trial court did not preclude defense counsel from seeking funding for an additional local expert. Under these circumstances, Burrow cannot demonstrate a manifest abuse of discretion.

Juror Misconduct

Finally, Burrow requests a new trial, or, in the alternative, reversal of the deadly weapon sentencing enhancements based on juror misconduct. In particular, a juror signed an affidavit stating that she brought a tape measure to the jury room and that the jurors use the tape measure to measure the blade length of the broken knife used in the commission of the burglary and attempted murder at Hulse's house.

Consideration of novel or extrinsic evidence, that is, information outside all the evidence admitted at trial, can be grounds for a new trial, unless it can be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. State v. Balisok, 123 Wn.2d 114, 866 P.2d 631 (1994); State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989).

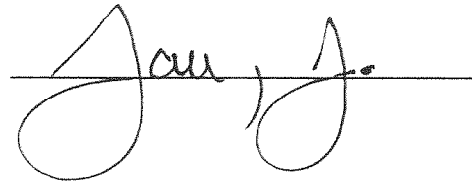
Here, even assuming without deciding that the tape measure was extrinsic evidence, we can conclude beyond a reasonable doubt that the use of the tape measure did not contribute to the verdict. First, the State argues that a naked-eye examination of the knife confirms that the blade is over three inches long. Burrow does not dispute the State's claim. Also, the jury was instructed as follows:

A knife having a blade longer than three inches is a deadly weapon.

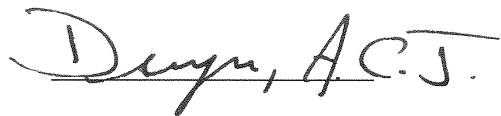
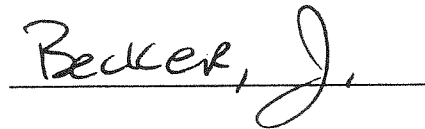
A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.

The State presented overwhelming evidence that Burrow repeatedly stabbed Hulseby in the shoulder, chest, and neck with the knife at issue, shouting that he was going to kill Hulseby. Doctors testified that injuries similar to those sustained by Hulseby could result in death. The jury found Burrow guilty of attempted murder in the second degree with regard to his use of the knife against Hulseby. Under these circumstances, we conclude that the jury would have found that the knife was a deadly weapon regardless of its length. Burrow fails to establish grounds for reversal.

Affirmed.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dwyer, A.C.J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Becker, J.", written over a horizontal line.